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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 555

STATE OF WASHINGTON EX REL. THE WASHINGTON WATER POWER COMPANY, A CORPORATION, CITY BANK FARMERS TRUST COMPANY, A CORPORATION, AND RALPH E. MORTON, AND CHELAN JOINT SCHOOL DISTRICT NO. 129, A MUNICIPAL CORPORATION, AND TOWN OF CHELAN, A MUNICIPAL CORPORATION,

Appellants,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Title 28, United States Code, Section 1257 (2), from a final judgment of the Supreme Court

of Washington entered the 6th day of September, 1949. The facts in the case may be briefly stated as follows:

On October 30, 1945, Public Utility District No. 1 of Chelan County instituted an eminent domain proceeding to condemn public utility property belonging to The Washington Water Power Company, a corporation. A large part of the property sought to be condemned consisted of a generating plant located on lands owned by the United States Government and maintained and operated by The Washington Water Power Company under a license granted by the Federal Power Commission. The Washington Water Power Company, and City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, the two trustees under the terms of a mortgage and bond issue previously made by The Washington Water Power Company on the property involved in the condemnation suit, were the original respondents named by the petitioner in eminent domain. After the suit was started and before the hearing upon petitioner's application for a decree of public use and necessity, Chelan Joint School District No. 129, a municipal corporation, and Town of Chelan, a municipal corporation, were each permitted to intervene in said eminent domain proceeding. After the aforesaid interventions were authorized by the Superior Court, said eminent domain proceeding was entitled, "Public Utility District No. 1 of Chelan County, a municipal corporation, petitioner, vs. The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, Respondents, and Chelan Joint School District No. 129, a municipal corporation, Intervener, and Town of Chelan, a Municipal Corporation, Intervener", and numbered 15728 in the files of the County Clerk of Chelan County, Washington. As such interveners the two municipal corporations last named joined with the original respondents in opposing

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the granting of the application for a decree of public use and necessity.

The Honorable Fred Kemp, Judge of the Superior Court of the State of Washington, for Chelan County, heard the testimony offered in support and in opposition to granting the decree of public use and necessity, and on November 19, 1948, made and entered a decree of public use and necessity. This decree adjudged the contemplated taking by the petitioner, Public Utility District No. 1 of Chelan County, of the property sought to be condemned and the severing of same from the remaining property of the respondent, The Washington Water Power Company, and the damaging, if any, of property incident thereto, to be necessary in the carrying out of the system or plan specified and adopted in and by Resolution No. 51 of said Public Utility District No. 1 of Chelan County, adopted October 18, 1945. It also adjudged that the contemplated use for which said real and personal property is sought to be taken to be a public use.

Under the laws of the State of Washington, such a judgment as made by the trial court is a final judgment unless review thereof be taken to the Supreme Court after the entry of such judgment.

> *State ex rel. Northwestern Electric Co.* v. *Superior Court,* 27 Wash. 2nd 694, 698.

Pursuant to an application therefor by the above named appellants, the Supreme Court of the State of Washington granted a writ of review of the said eminent domain proceeding, entitled, "State of Washington ex rel. The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, and Chelan Joint School District No. 129, a municipal corporation, and Town of Chelan, a municipal corporation, plaintiffs, vs. The Superior Court of the State of

Washington for Chelan County, Honorable Fred Kemp, Judge, Defendant", and numbered 30837 in the files of the Clerk of the Supreme Court of the State of Washington. The writ of review so issued directed the Honorable Fred Kemp, Judge of the Superior Court of the State of Washington, for Chelan County, to certify and file with the Clerk of the Supreme Court of the State of Washington, a full, true and complete transcript of the entire record of the above entitled eminent domain proceeding, and of all the proceedings in said Case No. 15728, including the Bill of Exceptions containing all the evidence adduced or presented in the said cause. The writ of review was duly complied with by the Honorable Fred Kemp and after a review of the proceedings in said eminent domain cause, and a hearing thereon by the Supreme Court of the State of Washington, that court filed an opinion on July 21, 1949, declaring the judgment of the trial court to be correct and affirming its action upon the application for a decree of public use and necessity. Thereafter appellants applied for rehearing, which was denied by said Supreme Court of the State of Washington on the 6th day of September, 1949, on which date the judgment of the Supreme Court was made and entered affirming the judgment of the trial court in entering the decree of public use and necessity.

Under the laws of the State of Washington the condemnation sought by means of the above entitled eminent domain proceeding would have failed had the decree of public use and necessity been denied. The laws of the State of Washington under which the said eminent domain proceeding was instituted and pursued, required that the system or plan of operation of the property sought to be condemned must be set forth in a resolution to be attached to and made a part of the petition in eminent domain. Appellants contended that the because the plan or system of operation to which the

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property would be subjected, was thus shown by the petition in eminent domain to be in violation of the Federal laws, that to construe and apply State laws to permit condemnation under a plan of operation in violation of the United States laws, was to construe such laws as being valid though repugnant to the laws of the United States.

Appellants have at all times contended that those State statutes which are referred to, together with summaries of pertinent provisions thereof, under the heading of this Jurisdictional Statement entitled, "State Statutes the Validity of Which is Involved", are repugnant to those Federal statutes the citations and pertinent parts of which are hereafter set forth:

"• • •.

"All licenses issued under this part shall be on the following conditions:

"• • •.

"(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prives for electrical energy or service are hereby prohibited.

"• • •."

(Vol. 49, United States Statutes at Large, Sec. 206, p. 842, 844; U.S.C.A. Title 16, Sec. 803 (h).)

"That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development,

transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: * * *."

(Vol. 41, United States Statutes at Large, Sec. 19, p. 1073; U.S.C.A. Title 16, Sec. 812.)

The Supreme Court of the State of Washington held that the State statutes as construed and applied were not repugnant to the above cited Federal Statutes, and therefore were not invalid.

Two of the judges of the Supreme Court of Washington dissented from the opinion affirming the judgment of the trial court and the decree of public use and necessity granted as such judgment, on the ground that upon the issues presented by the Federal questions the order granting a decree of public use and necessity entered by the trial court should be reversed.

II. State Statutes the Validity of Which Is Involved

There was thus drawn in question the validity under Article VI of the Constitution of the United States, of certain statutory provisions of the State of Washington which appellants claimed were repugnant to laws of the United States made in pursuance of the Constitution of the United

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States. The pertinent provisions are appropriately summarized below, the section numbers being those used in Remington's Revised Statutes of Washington, Annual Pocket Parts thereto, and bound Supplements to Remington's Revised Statutes of Washington:

REMINGTON'S REVISED STATUTES, Section 11610, 1945 Supplement, the pertinent provisions of which grant to public utility districts the right of eminent domain and require that it be exercised and instituted pursuant to resolution of the commission and conducted in the same manner and by the same procedure as is or may be approved by law for the exercise of the power of eminent domain by incorporated cities and towns in the State of Washington in the acquisition of utility properties.

REMINGTON'S REVISED STATUTES, Section 11611-1, 1941 Supplement, the pertinent provisions of which require that any resolution of a public utility district providing for the condemnation of any public utility must require that such resolution shall specify and adopt the system or plan proposed and declare the estimated cost thereof, and shall specify whether general obligation or utility revenue bonds are to be issued to defray such costs.

REMINGTON'S REVISED STATUTES, Section 9488, 1940 Pocket Part (in effect at the time the eminent domain proceeding being reviewed by the Supreme Court of the State of Washington was instituted), the pertinent provisions of which grant to cities the right to condemn and purchase plants and facilities for the purpose of furnishing such city or town or the inhabitants thereof electricity for lighting, heating, fuel and power purposes.

REMINGTON'S REVISED STATUTES, Section 9489, 1941 Supplement, the pertinent provisions of which require that the council or other corporate authorities of any city if they

deem it advisable that the city of which they are officers shall acquire any public utility mentioned in Remington's Revised Statutes, Section 9488, 1940 Pocket Part, shall provide therefor by ordinance which shall specify and adopt the system or plan proposed.

REMINGTON'S REVISED STATUTES, Section 9217, the pertinent provisions of which provide whenever an ordinance has been passed by a state legislative authority, the carrying out of which will require that property be taken/or damaged for public use, the public utility shall file a petition with the city or county where the land sought to be condemned is situated, praying that just compensation shall be ascertained for the property to be so taken or damaged.

REMINGTON'S REVISED STATUTES, Section 9218, the pertinent provisions of which require that a petition for condemnation, such as that referred to in Section 9217 above, shall contain a copy of the ordinance providing for the condemnation (which shall specify and adopt the system or plan proposed).

REMINGTON'S REVISED STATUTES, Section 11611-2, 1941 Supplement, the pertinent provisions of which provide that whenever the commission shall deem it advisable to issue revenue bonds for the purpose of defraying the cost of a public utility being condemned, it shall have the power as a part of such plan and system to create a special fund or funds for the purpose of defraying the cost of such public utility, and into which said fund or funds it may obligate and bind the district to set aside and pay a fixed proportion of the gross revenues of such public utility, and to issue and sell utility revenue bonds on warrants payable as to both principal and interest only out of such fund or funds.

REMINGTON'S REVISED STATUTES, Section 11611-3, 1945 Supplement, the pertinent provisions of which provide that

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any resolution creating any such special fund and authorizing revenue bonds payable therefrom may contain covenants, including a covenant for the establishment and maintenance of and charges for electric energy so furnished or supplied by the public utility.

REMINGTON'S REVISED STATUTES, Section 11611-7, 1941 Supplement, the pertinent provisions of which provide that the commission of each district which shall have revenue bonds outstanding shall have the power and shall be required to establish, maintain and collect rates and charges for electric energy which shall be adequate to provide revenue sufficient for the payment of principal of and interest on such bonds, and all payments which the district is obligated to set aside in any special fund or funds created for such purpose.

REMINGTON'S REVISED STATUTES, Section 11611-10, 1940 Supplement, the pertinent provisions of which provide that the issuance of any revenue bonds by a public utility district shall constitute a contract with the holder or holders of such bonds and that the obligation of a public utility district under such resolution or resolutions shall be enforcible by any bondholder by mandamus or by any other appropriate suit or action in any court of competent jurisdiction.

The foregoing Washington Statutes as construed and applied by the Supreme Court of the State of Washington, with two of the judges of said Court dissenting, permitted the condemnation of electrical generating property maintained and operated on Federal lands under a license from the Federal Power Commission, on the ground that the plan or system of operation by the Public Utility District as disclosed by the resolution made a part of the petition in eminent domain, showed that the property was not being taken for the purpose of operating the same under a plan or system which is repugnant to United States Laws.

III. Dates of Judgment and Appeal

Final judgment of the Supreme Court of Washington affirming the judgment of the trial Court, Honorable Fred Kemp, Judge of The Superior Court of the State of Washington for Chelan County, in granting a decree of public use and necessity, plainly sustained the validity of the Washington Statutes above set forth as the same were construed and applied in that aforementioned eminent domain proceeding which was reviewed by the Supreme Court of the State of Washington.

This judgment was entered on September 6, 1949. A petition for appeal to this Court was presented to the Honorable George B. Simpson, Chief Justice of the Supreme Court of Washington, on the 28th day of November, 1949, and was by him allowed the same day.

In treating and referring to the judgment of the Supreme Court of the State of Washington made and entered on September 6, 1949, as a final judgment, counsel for appellants are not unmindful of the following decisions of the Supreme Court of the United States:

Washington ex rel Perry v. *Superior Court of State of Washington for Chelan County*, 276 U. S. 626, 72 L. Ed. 738, 48 Sup. Ct. 320;

Washington ex rel McPherson Bros. Co. v. *Superior Court of State of Washington in and for Douglas County*, 274 U. S. 726, 71 L. Ed. 1335, 47 Sup. Ct. 769;

Grays Harbor Logging Co. v. *Coats-Fordney Logging Co.*, 243 U. S. 251, 61 L. Ed. 702, 37 Sup. Ct. 295.

We are aware that the holding of those cases is that a decree of public use and necessity in an eminent domain proceeding under the Washington statutes and constitution is not a final judgment within the meaning of Section 237, Judicial Code.

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Referring to judgments of the Supreme Court of Washington such as that which appellants are here endeavoring to appeal from, the Supreme Court of the United States has said:

> "• • • they are held reviewable by certiorari, and not by appeal, not because they are final, or are independent of the subsequent proceedings ascertaining the damages, but because in Washington proceedings by appeal are statutory, and no statute has been enacted giving an appeal from the order or judgment determining the questions of use and necessity; by reason of which, the writ of certiorari is employed as a means of exercising the constitutional power of review."
>
> (*State of Washington ex rel Grays Harbor Logging Co.* v. *Superior Court of Washington for Chehalis County*, 61 L. Ed. 702, 705).

Since the statement of the Supreme Court of the United States, the Supreme Court of the State of Washington has considered the question whether a decree of public use and necessity is a final judgment. In the recent case of *State ex rel Northwestern Electric Co., et al.* v. *Superior Court*, 27 Wash. (2), 694, the Supreme Court of the State of Washington held that a decree of public use and necessity in an eminent domain proceeding such as that reviewed by the Supreme Court of the State of Washington in the case at bar, is a final judgment; and in so holding the Supreme Court of Washington said in part:

> "• • •
>
> "Three questions are posed by respondent's motion to dismiss: (1) Was the writ of certiorari in the case at bar issuable as a matter of right and without notice? (2) Is the order or decree of public use and necessity in the case at bar a final judgment, appeal from which, or review of by certiorari, required to be perfected

within thirty days? (3) Have relators an adequate remedy by appeal?

"The first and second questions are answered in the affirmative and the third question in the negative * * *. (p. 696)

"* * *.

"* * *. If an appeal is not available, the decree of public use and necessity is a final judgment reviewable by writ of certiorari as a matter of right in aid of the appellate jurisdiction of this court. The statute (Rem. Rev. Stat., sec. 1002 (P. P. C. Sec. 15-3)) reading as follows, grants this right:

" 'A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.'

"It is clear from a reading of the foregoing statute that, where there is no right of appeal by which review may be had of alleged errors in a decree of public use and necessity, such decree is a final judgment which may be reviewed only by writ of certiorari, which, of course, issues as a matter of right. * * *." (pp. 696, 697)

"* * *.

"The exercise of the power of eminent domain is a special proceeding ordinarily involving the entry of three separate and distinct judgments. Chicago, M. & P. S. R. Co. *v.* Slosser, 82 Wash. 467, 144 Pac. 706, and State ex rel. Grays Harbor Logging Co. *v.* Superior Court, 100 Wash., 485, 171 Pac. 238." (P. 701)

"* * *.

"* * * If it be conceded, *arguendo*, that such right of appeal is granted, it does not follow, in view of the established law of this state that there are three

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> separate judgments in a condemnation proceeding, that the appeal is from the second instead of from the first or third of such judgments; that is, from the judgment on the award rather than from the decree of public use and necessity or the decree of appropriation. We agree with counsel for relators that the statute does not require or admit of such construction, and reason and practice do not recommend it." (p. 705)

Since the decisions of the three United States Supreme court cases last cited, holding a decree of public use and necessity in an eminent domain proceeding in the State of Washington is not a final judgment within Section 237 of the Judicial Code, the Supreme Court of the United States held that the characterization of a judgment as a final judgment by the State Court of last resort should be regarded by the Supreme Court of the United States in determining whether such a judgment was final.

In the case of *Thomas J. Brady* v. *Terminal Railroad Association of St. Louis*, 302 U. S. 678, 82 L. Ed. 523, 58 Sup. Ct. Rep. 134, the Court held:

> "It appearing that the judgment of the Supreme Court of Missouri is a final judgment under the decisions of that court cited by petitioner in his petition for rehearing, the petition is granted, the order denying a writ of certiorari is vacated, and the writ of certiorari is granted." (82 L. Ed. 523)

In *State of Washington ex rel Grays Harbor Logging Co.* v. *Superior Court of Washington for Chehalis County*, 61 L. Ed. 702, the Supreme Court of the United States said:

> When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by

the supreme court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound (United States v. Denver & R. G. R. Co., 191 U. S. 84, 93, 48 L. Ed. 106, 109, 24 Sup. Ct. Rep. 33; Messenger v. Anderson, 225 U. S. 436, 444, 56 L. Ed. 1152, 1156, 32 Sup. Ct. Rep. 739; Coe v. Armour Fertilizer Works, 237 U. S. 413, 418, 59 L. Ed. 1027, 1029, 35 Sup. Ct. Rep. 625)" (at p. 706).

Such a holding in the case at bar would have the effect of making it practically impossible for a public utility district to get the money with which to acquire a decree of appropriation. Certainly appellants should not be denied the right to a review of the holdings of the Supreme Court of the State of Washington on the question as to whether or not the Washington statutes involved in the condemnation were repugnant to the Federal Statutes, especially in a case like that at bar where the judges of the Supreme Court of Washington differed as to whether or not the State statutes were repugnant to Federal statutes, and the condemnation should for that reason fail. However, a holding that under the laws of the United States the judgment here sought to be appealed from was not a final judgment of which the United States Supreme Court had jurisdiction would make it practically impossible for any public utility district to borrow the money to finance a substantial award to acquire the property. Lenders would not be willing to finance a bond issue to be used for paying an award for property to be condemned when the question whether the plan or system of operation was repugnant to the United States Laws could only be determined in the Supreme Court of the United States after the property had been paid for and put in operation. This is especially true where, as in the case at bar, a dissenting minority of the Supreme Court of the State of Washington held that the Federal

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questions involved required a denial of the Decree of Public Use and Necessity.

IV. State of Proceedings and Manner in Which Federal Question Was Raised

The Federal question was raised at the outset and urged throughout all proceedings in the Superior Court of the State of Washington for Chelan County. One of the statutory grounds of the respondents' demurrers was:

> "6. That the petition in eminent domain does not state facts sufficient to constitute a cause of action."

Said demurrers to the petition in eminent domain were overruled.

The Supreme Court of the State of Washington has held in a large number of cases that the statutes with reference to eminent domain cases do not contemplate any answer upon the part of the condemnee. The person whose property is sought to be taken may, without any pleading, make any defense to such actions he sees fit.

McPherson Bros. v. *Superior Court for Chelan County,* 108 Wash. 58, 182 Pac. 962;

Seattle & M. R. Co. v. *Murphine,* 4 Wash. 448, 30 Pac. 720;

State ex rel. Ami Co. v. *Superior Court,* 42 Wash. 675, 85 Pac. 669;

In the Matter of Pike Street, 42 Wash. 551, 85 Pac. 45;

Manhattan Bldg. Co. v. *Seattle,* 52 Wash. 226, 100 Pac. 330;

Tacoma v. *Wetherby,* 57 Wash. 295, 106 Pac. 903;

Tacoma Eastern R. Co. v. *Smithgall,* 58 Wash. 445, 108 Pac. 1091.

After the Superior Court had overruled the demurrers of the original respondents in the eminent domain proceed-

ing, the Town of Chelan and Chelan Joint School District No. 129 each filed an intervener's complaint which raised the Federal questions here involved, which complaints were both succeeded by intervener's amended complaints, which amended complaints likewise raised the Federal questions and were on file and before the Superior Court at the time of the hearing upon the application for decree of public use and necessity.

In the Superior Court's memorandum decision on motion to make more definite and certain, and on demurrer, the trial Court ruled directly on the Federal questions involved, as appears more fully from a copy of that opinion which is appended to this Statement, and marked "Appendix B". That opinion, designated, "Memorandum Decision on Motion to Make More Definite and Certain, and on Demurrer", shows that the Superior Court, in ruling on the demurrer, held that the State statutes in question as construed and applied were not repugnant to the Federal statutes above referred to.

At the hearing upon the application for the decree of public use and necessity, appellants again raised the Federal question by counsel for respondents in said eminent domain proceeding, by the use of the following language:

> "In the third place, Respondents are going to object to the entry of an Order of Public Use and Necessity at this time on the ground and for the reason that the plan of operation set forth in the Resolution, which is made part of the Petition in Eminent Domain, shows clearly that if the property be condemned that it will be operated, if at all, in violation of the Federal laws prohibiting the maintenance of rates or any agreement to maintain rates by the Federal licensee, and in defiance of that part of the law which gives to the Federal Power Commission the right to fix rates in the event that a State Supervising Authority does not fix

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the rates at which power shall be sold by the licensee of the Federal project."

(Bill of Exceptions, certified by the Superior Court, p. 254.)

The opinion of the Superior Court of the State of Washington for the County of Chelan appended to this Statement, marked "Appendix C", affirmatively shows that the Federal questions were presented to, considered, and decided by it adversely to appellants.

> "I am not unmindful of the urgent and persuasive argument made by counsel regarding the other Federal questions as to the right—particularly as to the right—of the Public Utility District to proceed in this case under the franchise or license, and without any consent or permission from the Federal License Commission, but the questions in that were, I think, determined by the Court in the ruling on the demurrer."
>
> (Page 264, Bill of Exceptions certified by Superior Court.)

Rule 16 of the Supreme Court of the State of Washington requires a statement of questions involved. Subparagraph 4 of said Rule 16 provides:

> "The statement of the questions involved must set forth each question separately in the briefest and most general terms, without names, dates, amounts or particulars of any kind. * * *."

The first three questions set forth in the Statement of Questions Involved in plaintiffs' brief in the Supreme Court of the State of Washington from which an appeal has been allowed, were as follows:

> "1. Do the limitations in a Federal Power Commission license which is acquired from the original licensee by condemnation remain binding on the condemnor?

"2. Can a PUD condemn a federally licensed hydro electric plant when the system or plan upon which the condemnation is based provides for revenue bonds containing covenants repugnant to Federal law?

"3. Are the Washington Statutes re eminent domain proceedings by PUD's invalid when construed to authorize condemnation by such districts of federally licensed power projects pursuant to a system or plan containing provisions repugnant to Federal law?"

(P. 2, Brief of Plaintiffs in the Supreme Court of the State of Washington.)

Appellants maintained in the Superior Court and also in the Supreme Court of Washington, that the State statutes involved, if construed and applied as they were by the Superior Court and the Supreme Court of the State of Washington, would be repugnant to two Federal Statutes, which are:

Vol. 49, United States Statutes at Large, Sec. 206, p. 842, 844; U. S. C. A. Title 16, Sec. 803 (h);

Vol. 41, United States Statutes at Large, Sec. 19, p. 1073; U. S. C. A. Title 16, Sec. 812.

The opinion of the Supreme Court of the State of Washington appended to this Statement affirmatively shows that the Federal questions were presented to, considered and decided by it. That Supreme Court held the state statutes as construed and applied were not repugnant to the United States statutes.

"* * *

"The first three contentions may be considered together. The substance of the company's argument on those points is that the District, as transferee, takes the Federal Power Commission license subject to all the provisions and limitations contained therein; that one of those provisions vests authority in the Federal Power Commission to regulate the services rendered

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and the rates charged by the licensee; that the district's proposed bond issue contains covenants guaranteeing bondholders that the district will maintain rates sufficient to pay the interest and retire bonds as due; that such a covenant denies the right of the Federal Power Commission to regulate rates and is contrary to the Federal Power Act in that it is an agreement to fix or maintain rates."

The dissenting opinion of two judges of the Supreme Court of the State of Washington appears in connection with the opinion of the Supreme Court of Washington which is appended to this Statement. It likewise affirmatively shows that the Federal questions were presented to, considered and decided by the Court:

> "I disagree with the majority in its conclusions upon the first three contentions made by the plaintiff Company, considered collectively by the Court. Upon the issues presented by those contentions I think the order entered by the trial court should be reversed."

In view of the opinion of the Supreme Court of the State of Washington in the recent case of *State ex rel Northwestern Electric Co., et al.* vs. *Superior Court,* 27 Wash. (2d) 694, and in view of the order of the Supreme Court of the United States in the case of *Thomas J. Brady* vs. *Terminal Railroad Association of St. Louis,* 302 U. S. 678, 82 L. Ed. 523, 58 Sup. Ct. Rep. 134, appellants respectfully request the court, in the event that it should hesitate to note probable jurisdiction, that it enter an order passing upon the question of jurisdiction and determining whether the judgment appealed from is a final judgment until a hearing upon the merits.

V. The Federal Questions Involved Are Substantial

The ultimate Federal question presented to the Supreme Court of the State of Washington was:

If it clearly appeared from the petition in eminent domain, and the resolution of the Public Utility District authorizing the eminent domain proceedings attached to said petition as required by law, and from the undisputed evidence that the use of the property sought to be condemned was to be pursuant to a plan or system of operation in violation of Federal statutes:

Vol. 49, United States Statutes at Large,
Sec. 206, p. 842, 844; U. S. C. A. Title 16,
Sec. 803 (h);
Vol. 41, United States Statutes at Large,
Sec. 19, p. 1073; U. S. C. A. Title 16, Sec. 812;

was the petitioner Public Utility District entitled to a decree adjudicating the public use and necessity for the taking? The effect of granting such a decree by the Superior Court was to permit that court to proceed to a hearing for the determination of the amount of the award which would constitute just compensation for the property sought to be taken.

If the property sought to be taken was to be under a plan or system of operation in a manner contrary to the laws of the United States, appellants contend that the eminent domain proceedings must fail. Under the laws of the State of Washington the property could only be taken by eminent domain proceedings if it be taken for a public use. Since Article VI of the United States Constitution makes United States Laws made in pursuance of the Constitution the supreme law of the land, property could not be taken to be used under a plan or system of operation contrary to United States laws.

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The Supreme Court of the State of Washington construed and applied the Washington statutes hereinbefore specified as not being repugnant to the two United States Statutes above referred to.

It must be borne in mind at all times that appellants never contended that the public Utility District does not have the right to condemn a federally licensed project for the development of electricity, but they do contend and have at all times contended that the Public Utility District is without the right to condemn the federally licensed project here involved under the particular plan or system or operation set forth in the resolution authorizing the condemnation, because the plan or system of operation was to be in violation of the Federal Laws and the property could not, if the Federal Laws were observed, be put to any use whatsoever. To permit the condemnation for the purpose of operation pursuant to the plan or system in the resolution which was consistent with and authorized by the statutes of the State of Washington, was to necessarily hold that the statutes of the State of Washington authorizing such condemnation and system of operation were not repugnant to the Federal statutes.

In sustaining the validity of the Washington statutes here involved, both the Superior Court of the State of Washington and the Supreme Court of the State of Washington had before them Resolution No. 51 of Public Utility District No. 1 of Chelan County.

Said resolution contained, among other matters and things, the following:

> "E. In order to carry out the plan or system herein specified and adopted, the District shall issue and sell its revenue bonds in an amount not exceeding $10,000,000. Said bonds shall bear such date as shall hereafter be fixed by resolution, shall be of the denomination of $1,0000 each, shall be numbered from one

up, consecutively, and shall mature commencing with the second and ending with the thirtieth year after the date of issue thereof, in such amounts, as near as practicable, as shall, together with the interest on all outstanding bonds, be met by equal annual installments for the payment of the principal and interest on said bonds."

(Page 5 of Resolution No. 51, Marked "Appendix D" appended to this Statement.)

"• • •

"F. There shall be and there is hereby created and established, a special fund to be known as the 'Serial Electric Revenue Bond Fund, 1945.' The district does obligate and bind itself irrevocably to pay into such fund out of the gross revenues of the public utility herein established and the works, plants and facilities herein provided for, including all additions and betterments to and extensions of the foregoing now or hereafter purchased, condemned, constructed or otherwise acquired, such amount as may be necessary to pay the principal of and interest on said bonds as the same respectively mature. Such payments shall be made into such fund on the tenth day of each month after the issuance of any bonds hereunder in amounts at least equal to the sum of:"

(Page 6 of Resolution No. 51 appended to this Statement.)

"• • •

"There is hereby created and established in said 'Serial Electric Revenue Bond Fund, 1945', a Reserve Account. The district does hereby obligate and bind itself irrevocably to pay annually into such Account in the manner provided in paragraph 3 of this Section, not later than the principal payment date of each year, an amount equal to ten per cent (10%) of the total principal and interest requirements of the next ensuing year. Whenever the moneys in said

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Account aggregate an amount equal to the total principal and interest requirements for the next ensuing year, payments thereafter paid into said Account may be used by the District for the purpose of purchasing or redeeming said bonds, or for the purpose of making additions and betterments to and extensions of the electric utility system herein established, including the works, plants and facilities herein provided for, or for any other lawful purpose."

(Pages 6 and 7 of Resolution No. 51 appended to this Statement.)

"* * *.

"The District further binds itself to establish and maintain rates or charges for the electricity generated, transmitted and distributed by means of the public utility system herein established including all works, plants and facilities to be acquired or constructed as provided herein, and all additions and betterments to and extensions thereof which hereafter may be purchased, condemned or constructed, as will provide sufficient revenues to permit the payment of said sums into such special fund which the District has pledged to set aside for the payment of principal and interest and for the Reserve Account as herein provided, to be applied to the payment of the principal and interest of the bonds herein authorized until such bonds and interest shall have been paid in full, and in addition thereto, all costs of operation and maintenance."

(Resolution No. 51, last page preceding Certificate.)

"* * *."

Said resolution also shows that among the properties sought to be condemned is:

"The electric generating plant of the Washington Water Power Company located in Chelan County and listed below, including the powerhouse, dam, reser-

voir, flumes, raceways, diversion works, head works, waterways, buildings and other works and structures forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith and all lands of the Company on which same are situated, and all the Company's lands, easements and flowage rights permitting the storage of water for reservoir purposes and the flooding of lands lying along or adjacent to the Chelan River, and Chelan Lake, and the tributaries thereof in the State of Washington, and all other of the Company's real estate and interests therein, rights in respect of or relating to water, machinery, equipment, appurtenances, supplies, franchises, licenses, permits and other rights and other property forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith.

"THE CHELAN HYDRO-ELECTRIC GENERATING PLANT, situated on the Chelan River, in Chelan County and that certain license issued by the Federal Power Commission, Project No. 637, Washington, May 8, 1926, expiring May 8, 1976. The total name plate rating of the installed generators is 48,000 kilowatts."

(Page 2 of Resolution No. 51.)

That the above described generating property is under license from the Federal Power Commission is shown by Exhibit 5 made part of the Bill of Exceptions by the order certifying the same on the 2nd day of March, 1949, by Honorable Fred Kemp, Judge of the Superior Court of the State of Washington.

That the Federal questions involved in this appeal are substantial appears from Pages 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the opinion of the Supreme Court of the State of Washington, a copy of which is marked "Appendix A" and hereto appended, and from the dissent of the dissenting

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judges which is set forth upon and as part of the said Appendix A.

VI. It is therefore respectfully submitted that this Court has jurisdiction of this appeal under Title 23, United States Code, Section 1257, Paragraph 2.

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 30837 En Banc

THE STATE OF WASHINGTON ex Rel., THE WASHINGTON WATER POWER COMPANY, a Corporation, CITY BANK FARMERS TRUST COMPANY, a Corporation, and RALPH E. MORTON, and CHELAN JOINT SCHOOL DISTRICT No. 129, a Municipal Corporation, and TOWN OF CHELAN, a Municipal Corporation, *Plaintiff*,

v.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE, *Defendant*

Filed July 21, 1949.

This proceeding is by way of a writ of certiorari to review the action of the superior court of Chelan County in an eminent domain proceeding.

Action was commenced by Public Utility District No. 1 of Chelan county (hereinafter called the district) by which it sought to acquire by condemnation practically all of the property of the Washington Water Power Company (hereinafter called the company), in Chelan county and some of its property in Douglas county. Chelan Joint School District No. 129, and the Town of Chelan, both municipal corporations, were permitted to intervene in the action.

Demurrers were interposed by the company and the interveners. Application for an order for public use and necessity was brought on for hearing, after which the court overruled the demurrers and entered the order which is the subject of this review.

The property sought to be condemned consists of the transmission lines of the company in Chelan county and some in Douglas county, and the electric generating plant described as the Chelan Hydro-Electric Generating Plant, situated on the Chelan river, in Chelan county, and that

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certain license issued by the Federal Power Commission, Project No. 637, Washington, May 8, 1926, expiring May 8, 1976.

We shall have occasion throughout this opinion to refer to sections of the Federal Power Act. The entire Act is contained in 16 U. S. C. (1946 ed.) Section 791 through Section 825, and in 16 U. S. C. A., Section 791 through Section 825. In the interests of brevity, we shall cite the Act only by section numbers.

The company relies upon the following points before this court.

"(1) The limitations originally inherent in a license to develop, generate, transmit and distribute hydroelectric power issued by the Federal Power Commission remain restrictions upon a municipality to which the license is transferred by judicial sale.

"(2) Under the statutes of the State of Washington a public utility district does not have the right to condemn a utility property when the system or plan proposed and set forth in the Resolution pursuant to which the right of eminent domain is exercised and instituted, provides that the property shall be paid for by revenue bonds containing covenants repugnant to the United States laws.

"(3) If the Washington statutes re eminent domain proceedings by public utility districts are construed to authorize condemnation by public utility districts of power projects operated under a license from the Federal Power Commission and payment therefor with proceeds of revenue bonds containing (a) a covenant to maintain rates, and (b) a covenant which is contrary to the provisions of the Federal Power Act for regulation and control of rates by the Federal Power Commission in the absence of regulation of the rates charged by such licensee, they are invalid because they are repugnant to the laws of the United States.

"(4) A public utility district cannot acquire property by condemnation when such property is situated in a county other than that in which is situated the superior court of the county wherein the petition in eminent domain is filed.

"(5) The United States of America is a necessary party to an eminent domain proceeding when a hydroelectric generating property is situated in part on property owned by the United States of America and is owned and operated by a public service corporation under the terms of a license issued by the Federal Power Commission pursuant to the provisions of the Federal Power Act.

"(6) Public interest is a necessary concomitant of public use and when a critical power shortage such as now exists in the State of Washington, and such as existed at the time of the hearing on the application for a Decree of Public Use and Necessity, requires the curtailment of the use of electric power and energy, the greater public use requires that all generating facilities be operated so as to produce the maximum amounts of electric power and energy. That being so, a decree of Public Use and Necessity should be denied a public utility district petitioner in an eminent domain proceeding where the evidence indicates that if the public utility district operates the hydroelectric property sought to be condemned, in such manner as to first make adequate provision for the needs of the district as required by law, the people of the State of Washington will suffer the loss of a very large number of kilowatt hours of electric energy, and said facilities will not and cannot be operated for the greatest public use of the inhabitants of Washington.

"(7) The fact that two municipalities (one of them wholly within, and the other partially within, the geographical limits of a public utility district) will each suffer a large loss of income from taxes and have their respective capacities for incurring bonded indebtedness drastically reduced to a point where their capacities for performing essential services to their respective inhabitants are materially reduced, by the removal of electrical properties from the tax rolls in the event of the acquisition of such properties by the public utility district, coupled with the fact that the people of the State of Washington will lose a large amount of electrical energy by reason of the operation of such hydroelectric properties in conformity with law by the public utility district, is a matter of such public interest as to affect the

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question of whether a decree of public use and necessity should be entered, and would make material, relevant, and competent all of the offers of proof by the Town of Chelan, a Municipal Corporation, and by Chelan Joint School District No. 129, a Municipal Corporation.

"(8) The petitioner is not entitled to a Decree of Public Use and Necessity entitling it to acquire by condemnation the generating capacities of respondent, The Washington Water Power Company, a corporation, because petitioner has contracts for an adequate supply of power."

The first three contentions may be considered together. The substance of the company's argument on those points is that the District, as transferee, takes the Federal Power Commission license subject to all the provisions and limitations contained therein; that one of those provisions vests authority in the Federal Power Commission to regulate the services rendered and the rates charged by the licensee; that the district's proposed bond issue contains covenants guaranteeing bondholders that the district will maintain rates sufficient to pay the interest and retire bonds as due; that such a covenant denies the right of the Federal Power Commission to regulate rates and is contrary to the Federal Power Act in that it is an agreement to fix or maintain rates.

The license to construct and maintain the Chelan dam was originally issued by the Federal Power Commission to the Chelan Electric Company, which, with the consent of the Commission, assigned its rights to The Washington Water Power Company. Article 28 of that license, the provision in question here, provides in part:

"Article 28. The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies

within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control. . . . *Provided*, That the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this Article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

The inclusion of this Article stems from Section 812 of the Federal Power Act which provides:

"As a condition of the license, every licensee under this chapter which is a *public-service corporation*, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regula-

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tion and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter." (Italics ours.)

By Resolution No. 51, the district sought to acquire the properties in question. The resolution set up a plan for the acquisition at an estimated cost of $10,000,000.00, to be financed by the sale of revenue bonds and created a special fund to be known as the "Serial Electric Revenue Bond Fund." The district obligated and bound itself irrevocably to pay into that fund out of the gross revenues such amount as may be necessary to pay the principal on the bonds as they mature. It also bound itself to establish and maintain rates sufficient to provide revenues to permit the payment of funds into the special fund for the payment of bonds, interest, and all costs of operation.

It is the contention of the company that the district is not a regulatory agency of the state, and therefore, the plan to issue revenue bonds, containing an agreement to maintain or increase rates as an integral part of the plan of operation, is contrary to Article 28 of the license and Section 812 of the Act, in that it is an interference with the reserved right of the Federal Power Commission to regulate rates and charges of a licensee.

On the other hand, the district contends that it is a duly constituted agency of the state, clothed with delegated authority from that sovereignty to regulate and control rates and services, and therefore free from Federal regulation under the provisos to Article 28 of the license and Section 812 of the Act. This theory is based upon Rem. Supp. 1945, Section 11610 (d) which authorizes public utility districts to sell electric current "for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof free from the jurisdiction and control of the Director of Public Works and the Division of Public Utilities."

Our first problem, therefore, is to determine whether the state *delegated* power to the public utility districts to regulate rates within their borders, so as to constitute them agencies of the state, or whether it *abrogated* such power to them. From an examination of Rem. Supp. 1945, Section 11610 (d), it is obvious that the state did not delegate power to the public utility districts to act for it in the regulation of rates. The legislature created these municipal corporations and simply said that, as to such districts, there will be no such regulation whatsoever. Hence, the districts, at least in those matters set forth in the above statute, are neither agencies of the state nor answerable to the state; they are "full and exclusive" authorities within themselves.

Does this absence of state regulation open the door to Federal intervention, as the company contends? Turning again to the Federal Power Act, we note under Sec. 812 that only the following are subject to regulation by the Federal Power Commission:

". . . every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project . . . for sale or use in public service."

Section 796(3) of the Act defines "corporation" as follows:

"(3) 'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It *shall not include 'municipalities' as hereinafter defined:*" (Italics ours.)

Section 796 (7) defines "municipality" as follows:

"(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;" (Italics ours.)

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Section 797 (e) authorizes the commission:

"To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, *or to any State or municipality* for the purpose of constructing, operating, and maintaining dams, . . ." (Italics ours.)

Section 807 expressly reserves:

". . . the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation . . ."

We are of the opinion that it was the purpose of Congress, under Sec. 812, to confer jurisdiction upon the commission to regulate rates of licensees which are public service *corporations* and that it was not the intention to confer jurisdiction to regulate rates of licensees which are municipalities. Throughout the Act is evidenced a determination to recognize the independence of the states from domination or encroachment by the Federal Government. In construing this intent of the Act the Supreme Court of the United States declared, in *First Iowa Hydro-Electric Co-op. v. Federal Power Commission,* 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906:

". . . We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. The solution reached is to apply the principle of the division of constitutional powers between the State and Federal Governments. This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter."

In the same opinion the court quoted the remarks of Representative William LaFollette of Washington in the House debates on the Power Act:

". . . 'We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States.' 56 Cong. Rec. 9810.

"As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject."

See also *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749; *Re Nebraska Power Company*, 62 P. U. R. (N. S.) 276.

We are not unmindful of Sect. 801 of the Act which provides:

". . . any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: . . ."

We feel that the above section would bind the district as to provisions such as a limitation on the amount of water to be appropriated, etc., but that it would not give the commission the power to regulate rates of a municipality. It would bind the assignee only as to those provisions to which it could have been subjected had the assignee been the origi-

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nal licensee, and if such a licensee is a municipality, the commission has no authority to regulate its rates.

As grounds for its contention that the proposed bond-issue contract is "repugnant to the laws of the United States", the company relies upon Section 803 (h) which provides:

"(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

That section was enacted for the sole purpose of prohibiting monopolistic combinations, agreements, etc. It is the "anti-trust" section. For example, an agreement by The Washington Water Power Company, the Puget Sound Power & Light Company, and the Chelan P. U. D. to limit the output of electrical energy, or to restrain trade, or to fix, maintain, or increase prices for electrical service to the detriment of consumers would be prohibited. But it was not the intention of the provision in question to prohibit an agreement between the district and its bondholders that the district would maintain rates to pay the principal and interest of the bonds. Furthermore as we have stated previously, by becoming the assignee, the district does not *ipso facto* become subject to jurisdiction by the commission. Admitting *arguendo*, that the commission could exercise jurisdiction to regulate rates, there is nothing in the record that "upon complaint of any person aggrieved or upon its own initiative," the commission will ever exercise such regulation, or that it would not take into consideration the cost of operation and also the cost of purchasing the facility.

Therefore, as to the first three contentions of the company, we find nothing in the proposed revenue bond plan of the district contrary to the limitations imposed by United States law upon a municipality which is the assignee of a license of the Federal Power Commission.

Passing to a consideration of point No. 4, the testimony shows that the area now served by the company in Douglas county, and covered by its distribution system, is confined

to the banks of the Columbia River for approximately ten miles. It is devoted to orchards and serves only ten users. We held in *Carstens v. Public Utility District No. 1 of Lincoln County*, 8 Wn. (2d) 136, 111 P. (2d) 583, that a public utility district could condemn a portion of a distribution line lying in a county outside the district when the effect of such taking is only incidental. We are satisfied from the record here that the taking of the distribution lines in Douglas county is merely incidental to the taking of the Chelan county property, and hence, permissible.

We find no merit in the fifth contention, that the United States is a necessary party to this proceeding. No property of the United States is sought to be taken. Furthermore, the company has no right to complain that others having some interest in the land are not made parties. *Delfield v. Tulsa*, 191 Okla. 541, 131 P. (2d) 754.

Nor is there any merit in the company's sixth point, the contention that the critical power shortage in the Northwest would be intensified because the district would not be able to join the Pacific Northwest Power Pool. The testimony shows that the Pool was organized in 1941. Its purpose was to obtain the maximum power available during the war, and it was sponsored by the War Production Board and the Federal Power Commission. The members are: Idaho Power Company, Utah Power & Light Company, Montana Power Company, The Washington Water Power Company, Puget Sound Power & Light Company, City of Seattle, City of Tacoma, Bonneville Power Administration, Pacific Power & Light Company, and Portland General Electric Company.

Marshall L. Blair, superintendent of operations of The Washington Water Power Company, testified that the pool is primarily a coordination of operation, which includes such things as the stream flow, reservoir elevations, proper loading of plants at some given time to satisfy certain loads, transmission flows of power, coordination of breakdown, and coordination of maintenance. The power shortage has increased since the war, and will continue until at least 1953. Under this arrangement the Chelan plant has been shut down during the spring months to permit the

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storage of water, and the power has been obtained from other sources of the pool.

The company contends that the district cannot legally become a member of the pool and that to permit the district to take over the Chelan plant would result in a distinct loss of power to the people of the Northwest. It was admitted that there was no physical reason why the plant could not be operated by the district within the pool. It should be noticed that the cities of Seattle, and Tacoma are members of the pool. The question of the legality of a public utility district becoming a member of the power pool is not before us. If such a question should arise, legislation could, if thought advisable, be enacted to permit the districts to join the pool. Furthermore, the testimony shows that, at the time of the hearing, the district was in the process of entering into a twenty-year contract with the Bonneville Administration for the sale of power. By purchasing such power from Bonneville during any critical periods, the same result obtained by joining the pool would be accomplished. In addition, even though there would be a distinct loss of power to the people of the Northwest, the people of the state have decreed that they shall have the right to condemn and take over the facilities of the private power companies. It is not within the province of the courts to question the advisability, the cost, or the resultant loss of power due to such action.

As to the final contention of the company, the intervener school district offered to prove that the total values of property within the district are $6,435,118.00, and that the value of The Washington Water Power property therein is $3,243,608; that the total *ad valorem* property taxes of the district would be $83,656.53, and that the taxes to be paid by the company would be $42,166.90, which would result in a loss to the district in the amount of $42,166.90; that the loss could be compensated for only by special levies, which are difficult, if not impossible, to obtain because of the statutory requirement that 40% of the voters in the last gubernatorial election must vote in such special election; that the district now has outstanding bonds in the amount of $235,000.00; and that there was a 32 mill levy made in 1947 and paid in 1948.

Intervener Town of Chelan offered to prove that the total assessed valuation of the town is $2,099,223.00; that the value of The Washington Water Power property within the town is $898,456.00; that the total *ad valorem* taxes of the town would be $31,568.71 and that the taxes to be paid by the company would be $13,512.69, with the resultant loss to the town in that amount.

These offers of proof were refused by the trial court on the ground that the matter of the loss of revenue to a municipality is not a legal ground for refusing the public utility district the right of eminent domain. It is unfortunate that these municipalities might lose much needed revenue because of the condemnation of this property by the district, but that is a matter for the concern of the legislative branch of the government, rather than of the judicial branch. Municipalities, as such, have no inherent right of taxation. They derive their right to raise revenue from the state, and what the state has given, the state can take away.

In *Gasaway v. City of Seattle*, 52 Wash. 444, 100 Pac. 991, it was held that, when a city of the first class acquired real estate by exercise of its power of eminent domain, the county could not thereafter enforce a prior tax thereon even though the county had not been made a party to the eminent domain proceedings. In significant language, this court said:

". . . All taxes are levied under the express or implied power of state. The state can fix the subject of taxation and exempt property. It can limit or extend the time of payment. The authority so delegated, when exercised, is none the less the execution of the state's power. If it can do all these things, it can take away not only the power to tax but the subjects of taxation as well. No person or municipality can acquire, as against the state, a vested right to taxes, or the right to insist upon the collection of taxes when levied."

But though the state has taken away a primary source of revenue of these taxing districts, it has created a new source which, to a large extent, will compensate for such

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loss. Realizing the consequent loss of revenue to various taxing districts by the withdrawal from their tax rolls of property condemned by a public utility district, the legislature has enacted so-called "in lieu" taxes; we refer to Rem. Supp. 1941, Sect. 11616-2, which was amended by the Laws of 1947, chapter 259, Sect. 2, p. 1079, and by the Laws of 1949, chapter 227, Sec. 2, p. 799. This measure levies a tax, similar to the "occupation tax" that most businesses pay, on the gross revenues of all public utility districts and apportions the receipts among the taxing districts within their boundaries on the basis of former levies upon the fair value of property withdrawn from their tax rolls. Thus, it is problematical whether or not the interveners here would sustain any actual loss of revenue.

The judgment of the trial court is correct, and its order of public use and necessity is affirmed.

SCHWELLENBACH, *J.*

We concur:

JEFFERS, C. J.
BEALS, J.
ROBINSON, J.
MALLERY, J.
HILL, J.
GRADY, J.

STEINERT, J., dissenting:

I disagree with the majority in its conclusions upon the first three contentions made by the plaintiff company, considered collectively by the court. Upon the issues presented by those contentions, I think the order entered by the trial court should be reversed.

STEINERT, *J.*

I concur.
SIMPSON, J.

APPENDIX "B"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR CHELAN COUNTY

No. 15728

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, a municipal corporation, Petitioner,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, Respondents

Memorandum Decision on Motion to Make More Definite and Certain, and on Demurrer

The Defendant, the Washington Water Power Company, a separately filed its Motion to require the Petitioner to make paragraphs VI. and VII. of the Petition in Eminent Domain more definite and certain, by setting forth therein, verbatim, a copy of that certain license issued by the Federal Power Commission, Project #637, May 8, 1926, expiring May 8, 1976, referred to in Exhibit A of the Petition which by reference was made a part of said paragraphs.

This License, along with the other items of property sought to be condemned by Petitioner, is described on page 6 of Exhibit C, (Resolution #53), attached to the Complaint and made a part of it,—described in substantially the language used in the Motion. This License was issued originally to the Chelan Electric Company, and is now concededly and incident to, and a part of, the property of The Washington Water Power Company, and that such License is presently in the possession of Respondent, The Washington Water Power Company.

I am of the opinion that a party is not required, either by such motion or by Bill of Particulars, to furnish or set forth in pleading a copy of an instrument already in possession of Respondent, or equally accessible to him. (Messick

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v. National Council Knights and Ladies of Security, 103 Wash. 143).

Accordingly, the Motion to Make More Definite and Certain will be overruled.

This ruling is proper, also, I believe, because when it once appears that a part of the property, or one of the items thereof, sought to be condemned by Petitioner, is a License from the Federal Power Commission, the Court is charged with knowledge of, and must take cognizance of, the Federal Power Act and all of the provisions and conditions imposed by such Act upon licensees. At any rate, the Court was furnished with a copy of the License in question and had the same before it in the argument upon the demurrer which followed the argument on the motion to make more definite and certain. Consideration was given to the terms and conditions of the License, as fully as if it had been set forth by way of an exhibit attached to the Petition.

As to Demurrer:

The Washington Water Power Company demurred to the Petition on all the statutory grounds, urging chiefly, if not entirely, that the Petition in eminent domain of Public Utility District No. 1 of Chelan County does not state facts sufficient to constitute a cause of action. Respondent, The Washington Water Power Company, hereinafter referred to simply as "Respondent", earnestly contends that:

> "the System Plan and Resolution of the District shows on its face that it is in fundamental conflict with the Federal Power Act and that if the properties were acquired in accordance with such System Plan and Resolution they could not be operated under the Federal Power Act. The basic trouble with the System Resolution is that it is designed to acquire these properties by the issuance of the rather recent method of revenue bonds. The Resolution contains a binding agreement with the purchasers of the bonds that rates will be fixed and maintained at a sufficiently high level to pay all ordinary operating expenses and at the same time a sufficient amount to pay off the bonds in a thirty-year

period. In other words, the rates to be charged the present customers of the Public Utility District are rates to pay the operating expenses and provide the purchase price of the properties. It is true that this purchase price is spread over a period of thirty years. This is a matter of degree and not one of principal. The purchase price could have been amortized over a period of five years or even one year, and the present users of power would be forced to pay the purchase price of the property for the benefit of future users of the power.

"This concept is fundamentally in variance with the principles of the Federal Power Act which provides that the rates for power shall only yield a fair return on the value of the property in addition to operating costs."

In support of its argument the Respondent points out that 16 U.S.C.A., Sec. 801, provides that any sale or transfer of a Federal Power License, whether by voluntary transfer or judicial sale, (as in condemnation), shall be subject to all the conditions of the license under which such rights are held by such licensee, and also subject to all the provisions and conditions of the Federal Power Act to the same extent as if the successor or assignee were the original licensee.

And, further, respondent quotes 16 U.S.C.A., Sec. 812, which is as follows:

"SUBMISSION TO REGULATION—EFFECT OF STATE CONTROL—RATES—SERVICE—SECURITIES.

"Sec. 19. (Act of 1920). That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged.

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"That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

It is, of course, recognized that all the conditions of this License from the Federal Power Commission will be binding upon the transferee, whether the assignment of the License be by voluntary sale or by judicial sale such as condemnation. The System Plan and Resolution of the Petitioner frankly contemplates the charging of rates for electric energy, which will be sufficient not only to pay operation expenses but, also, pay the principal and interest on the bonds representing the purchase price of the property. But the Court cannot assume that reasonable rates, to be approved by the Federal Power Commission, will not be sufficient to pay off the cost of the property amortized over a thirty-year period, as well as pay the operating expense. That is not before the Court upon the demurrer to the Petition of the Public Utility District of Chelan County.

The Washington Water Power Company, itself, charges rates which presumably and undoubtedly not only pay all the operating expenses but also pay a return sufficient to

take care of dividends on stock and interest to mortgagee or bond holders. Whether the rates which the Public Utility District will be entitled to charge under the Federal Power Commission requiring that only a fair return can be exacted will exceed the rates charged by the present owner, The Washington Water Power Company, would be simply a matter of guess or speculation, which the Court upon demurrer is not required to make.

The Respondent insists that the Public Utility District is not subject to State regulation and, therefore, will be subject to regulation by the Federal Power Commission. I am of the opinion, however, that a public utility district is subject to State regulation, and that it is relieved from regulation as to rates and charges of payment for service by the provisions of Sec. 19 of the Act last above quoted. (Also 16 U.S.C.A., Sec. 812). That provision expressly provides that the Federal Power Commission shall exercise regulation and control as to rates "until such time as the State shall have provided the Commission *or outher authority* for such regulation and control." And, further, that section concludes as follows: "Provided that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a Commission *or other authority* for the regulation and control of that specific matter".

The Public Utility Law of the State, Sec. 11610 (d), gives to the District: "full and exclusive authority to sell and regulate and control the usual distribution rates, service charges and price thereof, free from the jurisdiction and control of the Director of Public Works and Division of Public Utilities, in all things. . . ."

That was a provision contained in the original Act, and by the Laws of 1941, Chapt. 182, Sec. 7, Rem. Rev. Stats., Supp. 11611-7, it was enacted, "The Commission of each district . . . shall have the power and shall *be required to* establish, maintain and collect rates or charges for electric energy and water and other services . . ."

It certainly seems to me the State has the right to grant authority for the fixing of rates and charges for electric

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service to a special commission, a director of some department, or to a Public Utility District, or the commission thereof. Such a commission is the "other authority" mentioned in the Federal Power Act above quoted.

And I am of the opinion, therefore, that when a Public Utility District, duly formed, has acquired property from which it is furnishing electric energy and fixed rates and charges therefor, the jurisdiction of the Federal Power Commission ceases.

The Respondent earnestly contends that the Plan and System adopted by the District, namely, the issuance of Revenue Bonds whereby the District is obligated to fix and maintain rates at a level sufficient to pay not only the operating costs but also sufficient to pay the amortized purchase price debt and interest, is contrary to the Federal Power Act, and particularly because the plan plainly contemplates the making of a profit on the operation and not merely charging rates sufficient to pay expenses of operation and a reasonable return on the investment. And the Respondent in this connection relies on the case of Central Nebraska Public Power & Irrigation District of the Federal Power Commission. 161 Fed. 2d 782. This case is an appeal from a ruling and decision of the Federal Power Commission, reported in Vol. 64, Public Utilities Reports, N.S., pg. 263. The Central Nebraska Public Power District had applied for exemption from the payment of their annual charges due under the Federal Power Commission License, on the ground that the power was sold to the public without profit. The Federal Power Commission held that when Power Districts made charges and received moneys which were used to pay for the properties, such moneys constituted "profit". And it was held that the reports of the Nebraska Power Company showed an excess of earnings and return from their power sales, over and above the expense of operation, and a reasonable return, and that therefore, that Power District was not entitled to exemption from payment of the annual charges imposed by the Federal Power Commission. The decision of the Federal Power Commission was affirmed in the Federal Circuit Court of Appeals.

The decision on that point must stand as final, since the

United States Supreme Court has denied certiorari in the case.

The Petitioner District, on its part, has contended that under our State law the operation of a Public Utility District is on a non-profit basis. It may be quite true that the words, "without profit" mean one thing under the Federal Power Act and an entirely different thing under the State Public Utility Act. And I am of the opinion it is fairly to be found in the Act and in the many cases of our own Court, interpreting it that the statutory provision not only permitting but requiring the payment of bonds representing the purchase price to be made out of the rates fixed and collected by the district, and that such earnings and application thereof do not constitute profit, inhibited by law.

Be that as it may, we call attention to Carstens vs. P U D No. 1, 8 Wash. 2d 136, 131, where the phrase is used.

> ". . . due to the fact that a municipally owned enterprise of this nature may not be operated for profit and must establish its rates at the lowest possible point. Uhler vs. Olympia, 87 Wash. 1."

I do not see how the decisions in the Central Nebraska Public Power & Irrigation District case can affect the right of Petitioner to maintain its condemnation proceeding. The case goes no further than to hold in that particular instance, that the Nebraska District was subject to the payment of reasonable annual charges fixed by the Federal Power Commission. Whether there is any escape from that payment by the Petitioner when its district is formed, we do not know. But if it does have to pay annual charges because of the License, which it has obtained by eminent domain, requires such payment it will mean only the payment by the local district of that charge, along with other expense, burdens of conducting its operation.

The Respondent further urges that the Plan and System of the Petitioner, as shown by its Resolution, is in conflict with 16 U.S.C.A., Sec. 803 (h), which reads as follows:

> "All licenses issued under this part shall be under the following conditions:

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(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

But as I have pointed out, the Federal Power Act expressly provides that the right of the Federal Power Commission to fix and control rates ceases when the State has placed the authority and responsibility therefor in the hands of some Commission or other authority. The fixing of rates, therefore, will be determined by the Commission of the Public Utility District itself, duly authorized so to do by the State statutory provision.

In this connection I call attention to the holding of our Supreme Court in the comparatively late case of State ex rel Northwestern Electric Co. vs. Superior Court, 128 Wash. Dec. 349-361, in which it was held as follows:

"We think it apparent that the district is not acquiring the franchise and properties of Northwestern for the purpose of:

"'Fixing the price or limiting the production or regulating the transportation of any product or commodity.'"

I shall not extend this memorandum much further. Nearly every objection that could be made to the acquiring of property by Public Utility District and its right to operate has been raised in one or more of the considerable number of cases involving Public Utility District formation, and its right of eminent domain, and to some extent the objections raised by Respondent or its demurrer have been covered, inferentially, at least.

The fact that in this case the objection is based upon the effort of Petitioner to condemn a license issued by the Federal Power Commission to Chelan Electric Company does not seem to me a question very much different from questions decided in the earlier cases. A license from the Federal Government is not altogether unlike a franchise held by a city or some other private corporation. Our statute expressly provides for the condemnation of franchises, along

with the rest of the property that may go to make up a power and light system.

It was held in State ex rel Washington Water Power Co. vs. Superior Court, 8 Wash. 2d 122, 131:

> "The right of the districts to secure the franchise of relators by eminent domain proceedings under ordinary circumstances, cannot well be questioned. The Act specifically gives the districts that right which conforms to the provisions of Article XII., Sec. 10 of our State Constitution . . . ."

We find in the books that "licenses are sometimes termed franchises, and franchises sometimes termed licenses." In fact, "franchise" is generally treated as of higher rank in the law than a license. "Franchise" has the right of a contract, while a license is rather in the nature of a personal privilege.

It may be that the Public Utility District, if it obtains the power plant of the Chelan River at the foot of Lake Chelan, and the License that the Company holds from the Federal Government, will be required to pay annual charges on the so-called profit: that is, on the amount of its rate earnings over and above the expense of operation, and what would be a reasonable return.

But if that be so, I cannot see that it is a valid objection to the District's right to condemn. That is a bridge that we do not have to cross at this time. It could be that the rates which the District will charge will not exceed the amount of rate charges made by the present owner, Washington Water Power Company, to cover its own operating expenses and the profit which it takes to pay in dividends and both interest and, possibly, reserve for retirement of bonded indebtedness. It would take evidence and proof to determine how such facts and figures compare. This, we are not expected to do on demurrer to the District's petition.

The demurrer of The Washington Water Power Company will be overruled.

City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, two Respondents who have appeared in

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this action separately from Respondent, The Washington Water Power Company, made the same motion and demurred upon the same grounds as did the Washington Water Power Company. The ruling as to these two Respondents, appearing separately from The Washington Water Power Company, will be the same on both the motion and the demurrer as has been indicated.

Dated this 14th day of January, 1947.

(S.) Fred Kemp,
Judge.

Copies to

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H. E. T. Herman,
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Harvey F. Davis,
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In the Superior Court of the State of Washington in and for Chelan County

No. 15728

Public Utility District No. 1 of Chelan County, a Municipal Corporation, *Petitioner,*

vs.

The Washington Water Power Company, a Corporation, City Bank Farmers Trust Company, a Corporation, and Ralph E. Morton, *Respondents*

Order Overruling Motion and Demurrer

The motion of the defendants, the Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation and Ralph E. Morton, respondents, requiring the petitioner to make its petition in eminent domain in the above entitled action more definite and certain, and the demurrer of said respondents, The Washington

Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, to petitioners petition in eminent domain in the above entitled action having come on regularly for hearing on the 8th day of September, 1947, and the petitioner being represented by its attorneys, Harvey F. Davis, Sam R. Sumner, Sr., and Sam R. Sumner, Jr., and the respondents being represented by Paine, Lowe and Coffin, and H. E. T. Herman and R. D. Kendall, their attorneys, and arguments of respective counsel for the parties having been heard, and the court having made and filed herein its memorandum decision and being fully advised in the premises, now, therefore,

It is hereby ordered, adjudged and decreed, that the motion and demurrer of respondents, The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, be and the same are hereby overruled.

Done in open court this 6th day of February, 1948.

(S.) FRED KEMP,
Judge.

Presented by:

(S.) HARVEY F. DAVIS,
Attorney for Petitioner.

Approved as to Form:

PAINE, LOWE & COFFIN,
H. E. T. HERMAN, and
R. D. KENDALL,
Attorneys for Respondents.
By (S.) PAINE, LOWE & COFFIN.

APPENDIX "C"

OPINION OF TRIAL JUDGE UPON APPLICATION FOR DECREE OF PUBLIC USE AND NECESSITY

JUDGE KEMP: I am sure of that. It might even be difference of opinion as to what the law is, but he would have a right to cite it as he understood it to be.

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Well, Gentlemen, I am going to announce my decision on this difficult case at this time. I am mindful of the fact that it could well deserve study and a careful analysis of the evidence, and discussion of the authorities that have been submitted, but while this does not concern you particularly it is a fact that here in this county we have just a one-man judge, and it is quite a busy time. I have no opportunity, except with a great amount of night work, to give study to cases. I am not sure, I doubt if it would bring me to any different conclusion. It would only be having the satisfaction of rendering a decision that might be very much more helpful.

I think it must be recognized that in this case new questions have developed that have not been presented in the considerable number of Public Utility condemnation cases that have been before our Supreme Court, in quite a number of which the Washington Water Power has been a party. It has impressed me, right through the case, that it does work a hardship on the people of the Town of Chelan and the Chelan Joint School District, but I do not feel that that is a legal question. It may be a practical and somewhat a moral question as to the advisability of taking this property that pays such substantial taxes, taking it off the tax rolls. But that question is involved in all these Public Utility District cases. We must keep in mind that when P. U. D. was created in this county, as I assume was true in all other counties, one of the most debated and chief controversial questions was about the advisability of adopting the P. U. D., was the fact it would take from the tax rolls of the county these private public utilities, if I may use that phrase, and that is a question that is a political question, a question of policy. But the people of Chelan County have noted on that, it is recognized that there is a loss, at least an apparent loss, to all tax payers when taxes paid by the Puget Sound Power & Light and the Washington Water Power Company are removed, that the citizens of the county, the property owners, have to raise, by taxes, the money that these public utilities have been paying. And so, in a way, the effect of this was or could have been,—in fact, I think was anticipated in the Chelan schools all over Chelan County. In the face of

such a question the P. U. D. has been created with all the rights of condemnation, the right to acquire these facilities has been given. It is, you might say, regrettable, it may work a hardship in particular cases, but that does not go to the question of the validity of the law nor to the right to condemn. The right of Eminent Domain works a hardship in many cases. It can take a man's home. While it is obligated to compensate him in money damages, it can't compensate him in sentimental value for the loss of the home that he built, perhaps with his own hands, where his children have been born and raised. And we may say, to some extent, the right of Eminent Domain is ruthless but if, for the public good, and public benefit, it seems best so to do by the municipal authorities, City, County, Public Utility District, that right exists in theory, at least, and probably in the long run it must be deemed to be for the public benefit.

So I feel obliged to say that, as far as its effects upon the Chelan Joint School District and the Town of Chelan, that the objections made are not any defense to the action in law. There may be, too, as Mr. Davis has suggested, some help that will come from the Lieu Tax provisions that have been enacted and from school equalization provision, and it could well be, as I have perhaps,—even as a judge, taking notice of what is a matter of common knowledge, that even further relief is contemplated or, at least, hoped for by the Legislature.

It seemed to me, too, that one of the questions that, as counsel conceded, was serious or, at least, apparently knew was the question of whether this district was justified in condemning a plant which produced twice as much electrical energy as the users of Chelan County P. U. D. needed, for it does appear that the plant at Chelan generates twice the power and electrical energy that is needed to supply, presently, all the users of electricity in the county, both those now served by the Puget Sound system recently acquired by the District, and those under the Washington Water Power system.

As to that, there are two answers, one that is rather obvious: they have already the Puget Sound system, that is, the distribution system which serves, by and large, the

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majority of the users of electricity in the county. Possibly, roughly, it might be said 75%, although that may be off a little either way. Now they have no power plant. They do have power, at least they have a source of power, either under some sort of arrangement, temporary purchasing arrangement with Bonneville, but I think it is fairly a reasonable and by no means arbitrary or capricious exercise of power for this P. U. D. of Chelan County to acquire for its use its own generating plant. The only plant, anywhere near adequate plant, located in the county, therefore in the District, is this Washington Water Power Plant at the foot of Lake Chelan and on the Chelan River. The Puget Sound Rock Island Dam produces an amount of energy many, many times in excess of the needs of the District, more than ever could reasonably be anticipated would be needed by the Chelan County P. U. D. system, so its acquisition would seem wholly impracticable and it would be very doubtful if the Court would uphold an attempt to acquire the Rock Island plant by condemnation. Furthermore that is not in Chelan County,—only partially so,—with the major and, I believe, the greater tax-paying portion of it located in Douglas County. So that with the great dam or reservoir, consisting of Lake Chelan and the Lake Chelan watershed and the power plant in the Town of Chelan or on the Chelan River at Chelan Falls, all within the county, it would seem entirely logical and reasonable and not injudicious for the Commissioners of the District to plan to acquire its own generating plant, and the only serious objection, if it be serious, is the fact that it produces more electrical energy by 100%, approximately, than is needed. But it, apparently, isn't out of reason that in the period within the next few years, perhaps even ten or twenty years, the demands for power in this district will require all the power that is developed at the Washington Water Power plant at Chelan.

At any rate, it would be unreasonable to insist that the only plant they could acquire would be one that, you might say, would be cut and measured to the exact amount of energy that is exactly needed at the moment. And the case, one case, the Bremerton case, perhaps the Centralia

case cited by Mr. Davis, would seem to indicate that the Supreme Court has already held that the acquisition of a plant furnishing more power than is presently needed, if it is not excessive, is justified.

I do not believe that there is serious question as to the jurisdiction of the Court or as to the venue. As already pointed out, the cases in which Washington Water Power Company have been parties in Okanogan County and in Lincoln County involve the same question, although the question of law, perhaps, was not raised. The same question was also in the northwest case involving the Northwest Electric Company in Vancouver, when they acquired distribution lines extending beyond the City of Vancouver into Skamania and I believe one other county. There is no question in the Court's mind but what this Court has had jurisdiction to hear and determine this matter.

As to the Government being a necessary party, I am of the opinion that the Federal Government is not a necessary party. If they have not had their day in court they will not be hurt. I don't mean to pass the question off that superficially, but the argument has rested largely on the statutory provision that if condemnation is adjudged and compensation is arranged for and given, that the Court shall give the decree vesting fee title in the property in the condemnor. But it was never contemplated that the fee title to franchise or license would be vested—or, to the property over which franchise or license ran, would be vested any more than it was conceivably thought of in the Vancouver city case—city franchises of Vancouver was involved, or in the Bellingham case, which was heard both in the Federal Court, as well as in the State court, involving franchise. I think I am correct in saying that in the City of Bellingham—I refer to the case of Puget Sound Power & Light vs. Whatcom County Public Utility District, in 123 Federal 2d, page 286. I don't seem to have another phase of the same case that, I think, was heard in the State court.

I am not unmindful of the urgent and persuasive argument made by counsel regarding the other Federal questions as to the right—particularly as to the right—of the

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Public Utility District to proceed in this case under the franchise or license, and without any consent or permission from the Federal License Commission, but the questions in that were, I think, determined by the Court in the ruling on the demurrer.

I will go back to say that, of course, if the transfer of this property to the Chelan County Public Utitlity District is given finally, it will vest fee title to the real estate held by the Washington Water Power Company, but all it can give, as far as the Federal Government is concerned, will be the transfer of the licenses, subject to all the rights and conditions and limitations that the Federal Government may have under its Federal Power Commission regulations. And I don't know whether that is involved here by any license or franchise it may have in the Town of Chelan and County highways as to rights of way, and so forth. It will not be fee title to the property over which these licenses and franchises give the Washington Water Power Company the right to run lines, but the transfer of the franchise, subject to all the conditions—limitations and conditions—that the licensors or grantors of the franchise have imposed.

I have not been able properly to analyze and discuss as fully as, perhaps, counsel would like, and I made no attempt to analyze and discuss the expert statistical testimony. It seems to me that the questions involved have been questions that could be reached and passed upon pretty much as I have done.

And my decision is that the Chelan County Public Utility District No. 1 is entitled to judgment, giving them the right to proceed with the condemnation, that is, the taking of the works, plants and facilities of the Washington Water Power Company described in the District's petition and in the exhibits attached thereto; and the damage, if any, of the property incident thereto is adjudged a public necessity and for the public use.

If there is nothing else, Court will adjourn.

APPENDIX "D"

RESOLUTION NO. 51

A Resolution establishing a public utility and providing for the acquisition, by purchase or condemnation, of certain works, plants and facilities for the generation, transmission and distribution of electricity, and the construction of certain additions and betterments thereto and extensions thereof, specifying and adopting a system or plan therefor, creating certain special funds, and authorizing the issuance and sale of revenue bonds in an amount not exceeding $10,000,000.00.

Whereas, Public Utility District No. 1 of Chelan County, a duly established municipal corporation of the State of Washington, hereinafter called the District, is authorized under Chapter I, Laws of Washington, 1931, as Amended, to acquire by purchase or condemnation, and to construct and operate a public utility for the purpose of furnishing the District and the inhabitants thereof, and any other person, including public and private corporations, within or without its limits, with electric current for all uses, and, for the purpose of defraying the cost of such public utility and of the plan and system specified and adopted therefor, is authorized to issue and sell utility revenue bonds and to create a special fund or funds for the payment of such bonds and the interest thereon, and

Whereas, the Commission of the District deems it advisable that the District acquire, by purchase or condemnation, and construct and operate such a public utility for such purpose,

Now, Therefore, Be it Resolved by the Commission of the District as follows:

Section 1. The public interest, welfare, convenience and necessity require the establishing by the District of a public utility for the purpose of furnishing the District and the inhabitants thereof, and any other persons, including public and private corporations, within or without its limits, with electric current for all public uses.

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Section 2. The District hereby specifies and adopts the system or plan herein set forth for the purpose aforesaid:

A. The District shall acquire, by purchase or condemnation, the following described electric works, plants and facilities now owned or operated by Washington Water Power Company, a Washington corporation, located in Chelan and Douglas Counties, State of Washington, to-wit:

FIRST

Generating Plants

The electric generating plant of the Washington Water Power Company located in Chelan County and listed below, including powerhouse, dam, reservoir, flumes, raceways, diversion works, head works, waterways, buildings and other works and structures forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith and all lands of the Company on which same are situated, and all the Company's lands, easements and flowage rights permitting the storage of water for reservoir purposes and the flooding of lands lying along or adjacent to the Chelan River, and Chelan Lake, and the tributaries thereof in the State of Washington, and all other of the Company's real estate and interests therein, rights in respect of or relating to water, machinery, equipment, appurtenances, supplies, franchises, licenses, permits and other rights and other property forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith.

The Chelan Hydro-Electric Generating Plant, situated on the Chelan River, in Chelan County and that certain license issued by the Federal Power Commission, Project No. 637, Washington, May 8, 1926, expiring May 8, 1976. The total name plate rating of the installed generators is 48,000 kilowatts.

SECOND

Transmission Lines

All of the electric transmission lines of the Washington Water Power Company in Chelan County and those spe-

cifically described in Douglas County, including towers, poles, pole lines, wires, switch racks, insulators and appurtenances, appliances, and equipment and all of the Company's other property, real, personal, or mixed, forming a part of or used, occupied or enjoyed in connection with or in any wise appertaining to said transmission lines or any of them, together with all rights of way, easements, permits, privileges, municipal or other franchises, licenses, consents, and rights for or relating to the construction, maintenance or operation thereof through, over, under or upon any public streets or highways or other lands, public or private. The transmission lines are generally described as follows:

a. The No. 1 Chelan-Stratford single circuit 110 Kv transmission line, extending from the above Chelan Hydro-Electric Generating Plant to and including the last pole or tower and all appurtenances of such pole or tower on the Chelan County side of the Columbia River.

b. The No. 2 Chelan-Stratford single circuit 110 Kv transmission line, extending from the above Chelan Hydro-Electric Generating Plant to and including the last pole or tower and all appurtenances of such pole or tower on the Chelan County side of the Columbia River.

c. The Chelan-Holden single circuit 110 Kv transmission line, extending from the Washington Water Power Company's Chelan Hydro-Electric Plant, in a northwesterly direction, in Chelan County, Washington, for a distance of about 52 miles, to the Howe Sound Company's Mine at Holden, on Railroad Creek near the upper end of Lake Chelan.

d. The Chelan single circuit 110 Kv tie line, extending from the Company's Chelan Hydro-Electric Generating Plant, in a southerly direction in Chelan and Douglas Counties, Washington, for a distance of about 6 miles, to a point in Douglas County where there is an interconnection with a Puget Sound Power & Light Company transmission line, and including all those appurtenances

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of interconnection owned in fee simple or by agreement by the Washington Water Power Company.

e. Any and all transmission facilities owned by the Washington Water Power Company and being in connection with, or useful to, the furnishing of power to the 110 Kv transmission line owned and operated by Okanogan County Public Utility District No. 1.

THIRD

Substations

All substations and substation sites of the Washington Water Power Company, in Chelan County, including all buildings, structures, towers, poles, equipment, appliances and devices for transforming, converting and distributing electric energy, and the lands of the Washington Water Power Company on which the same are situated, and all of the Washington Water Power Company's real estate and interests therein, machinery, equipment, appliances, devices, appurtenances and supplies, franchises, permits and other rights and other property forming a part of said substations or any of them, or used or enjoyed or capable of being used or enjoyed in connection with any thereof, including but not limited to the following:

110-Kv Only

a. Holden Mine Substation—any, and all, of those parts and facilities owned by the Washington Water Power Company.

Other Substations

a. All substations and switching stations and facilities of any voltage classification or description owned by the Washington Water Power Company within or adjacent to the Chelan Hydro-Electric Plant and at any other location or locations within the boundaries of Chelan County not hereinbefore described.

FOURTH

Distribution Systems

All electric distribution lines or systems of the Washington Water Power Company, located in Chelan County, including towers, poles, pole lines, wires, cables, insulators and appurtenances, appliances and equipment, including substations connected to said distribution systems not included above and all of the Washington Water Power Company's other property, real, personal, or mixed, forming a part of or used, occupied, or enjoyed in connection with or in any wise appertaining to said distribution systems or any of them, together with all rights of way, easements, permits, privileges, municipal or other franchises, licenses, consents, and rights for or relating to the construction, maintenances, or operation thereof through, over, under or upon any public streets or highways or other lands, public or private, including, but not limited to, the following:

a. THE LAKESIDE DISTRIBUTION SYSTEM as constructed and equipped in the City of Lakeside in Chelan County.

b. THE CHELAN DISTRIBUTION SYSTEM as constructed and equipped in the City of Chelan in Chelan County.

Notwithstanding the generality of above, the properties to be condemned are also understood to include all electric distribution lines and electric substations of the Washington Water Power Company as constructed and equipped, outside of the incorporated communities above mentioned, within Chelan County.

Included in the distribution system properties to be condemned are any and all parts of only those certain lines located in Douglas County and owned by the Washington Water Power Company as hereinafter specifically described:

a. A nominal 13 Kv line which crosses the Columbia River at two points and which runs generally along the left bank of the river in sections 1, 2, 10, 11 and 12 of T26N, R22E, W.M.

b. A nominal 13 Kv line which crosses the Columbia River at one point and which runs generally along the

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left bank of the Columbia River in sections 9, 16, 20, 21, 29, 31 and 32 in T27N, R23E, W.M. and in section 6, T26N, R23E, W.M.

and serving the town or community of Beebe and areas adjacent thereto, together with all improvements, structures, equipment, transformers, services, meters, appurtenances and accessories thereto.

FIFTH

Miscellaneous Property

All real estate and other physical property owned in fee by the Company and permanently located or fixed in Chelan County, including but not limited to office buildings, warehouses, repair shops, property held for future use, tools and similar equipment, and communication equipment; and any other property fixed or movable, useful or necessary or dedicated principally to the operations of the properties being taken, or any of them, including but not limited to maps, books, records, automotive or power equipment, office equipment and furniture.

Together with all and singular the tenements, hereditaments and appurtenances belonging or in any wise appertaining to the aforesaid property or any part thereof, with the reversion and reversions, remainder and remainders and the tolls, rents, revenues, issues, earnings, income, product and profits thereof, and all the estate, right, title and interest and claim whatsoever, at law as well as in equity, the Company now has or may hereafter acquire in and to the aforesaid property and franchises, leases and consents and every part and parcel thereof.

B. The District shall cause to be made any and all surveys, appraisals, financial and engineering investigations necessary or incidental to the acquisition by purchase or condemnation of the electric works, plants and facilities aforesaid and to the construction of said additions and betterments to and extensions thereof, and the placing of the same into operation, and shall cause to be performed any and all fiscal, engineering, accounting and legal services

necessary or incidental to said acquisition and construction and placing into operation.

The District may modify details of the foregoing system or plan where deemed necessary or advisable in the judgment of the Commission of the District, when not substantially changing the purposes herein specified. Should any part or provision of the foregoing system or plan be held to be invalid, such holding shall not affect the validity of any other portion or provision hereof.

The public utility hereby established and to be acquired by purchase or condemnation or constructed pursuant to the system or plan herein specified and adopted (hereinafter sometimes called the Public Utility) shall consist of the electrical works, plants and facilities hereinabove described together with all additions and betterments thereto and extensions thereof (including all additional works, plants and facilities acquired by the District for the same uses, whether or not physically connected therewith) which may be acquired by purchase or condemnation or constructed by the District after the purchase, condemnation or construction of the works, plants and facilities hereinabove described.

C. The estimated cost of the plan or system herein specified and adopted is declared, as near as may be, to be the sum of ten million dollars ($10,000,000.00).

D. That the gross revenues and proceeds to be derived by the District from the operation of the foregoing electric generating, transmission and distribution works, plants and facilities to be acquired hereunder by purchase or condemnation, including the additions, betterments and extensions herein provided for, at the rates to be charged for the electricity furnished thereby will be sufficient in the judgment of the commissioners of the District to meet all expenses of operation and maintenance, and to permit the setting aside in a special fund, hereinafter created, at the times herein specified, out of the gross revenues of the same, the amounts hereinafter specified to pay the principal of and interest on the bonds hereby authorized to be issued as the same become due and payable, and to create and main-

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tain the reserve account hereinafter created as a part of said special fund.

E. In order to carry out the plan or system herein specified and adopted, the District shall issue and sell its revenue bonds in an amount not exceeding $10,000,000. Said bonds shall bear such date as shall hereafter be fixed by resolution, shall be of the denomination of $1,000 each, shall be numbered from one up, consecutively, and shall mature commencing with the second and ending with the thirtieth year after the date of issue thereof, in such amounts, as near as practicable, as shall, together with the interest on all outstanding bonds, be met by equal annual installments for the payment of the principal and interest on said bonds.

Said bonds shall bear interest not exceeding four & one-half (4½%) percent per annum, payable semi-annually, shall have interest coupons attached to and made a part thereof, shall be payable both as to principal and interest in lawful money of the United States at the office of the Treasurer of the District or at the Fiscal Agency of the State of Washington in the City and State of New York, at the option of the holder, shall be obligations only against the special fund created and established in Paragraph F hereof, and shall be executed in such manner and shall be in such form not inconsistent with law or herewith, both as to the bonds and coupons, as the commissioners of the District hereafter shall prescribe by resolution.

Said bonds shall be registerable as to principal only, and suitable provisions for such registration shall be endorsed thereon.

Said bonds shall be subject to redemption at the option of the District, as the District hereafter shall prescribe by resolution.

F. There shall be and there is hereby created and established, a special fund to be known as the "Serial Electric Revenue Bond Fund, 1945." The District does obligate and bind itself irrevocably to pay into such Fund out of the gross revenues of the public utility herein established and the works, plants and facilities herein provided for, including all additions and betterments to and extensions of

the foregoing now or hereafter purchased, condemned, constructed or otherwise acquired, such amount as may be necessary to pay the principal of and interest on said bonds as the same respectively mature. Such payments shall be made into such fund on the tenth day of each month after the issuance of any bonds hereunder in amounts at least equal to the sum of:

1. A fraction of the payment (less any applicable amounts already in such Fund), to become due for principal on said bonds issued hereunder on the next principal payment date, if any, within one year, and

2. A fraction of the payment (less any applicable amounts already in such Fund), to become due for interest on the bonds, issued hereunder and then outstanding on the next interest payment date.

3. A fraction of the payment (less any applicable amounts already in such Fund), to become due for the Reserve Account of said Fund, hereinafter provided for, for such bonds on the next principal payment date.

In each case, the fraction shall be one, divided by the number of first days of the month prior to such interest payment date or such principal payment date, as the case may be.

During the first year said bonds are outstanding, in lieu of the payments provided for in paragraph 3 above, the District shall pay into the Reserve Account of said Fund an amount equivalent to the difference between the average amounts required in subsequent years to pay the interest on and principal of said bonds, and the amount required the first year of the life of said bonds for interest alone, such payment shall be made in equal monthly installments.

There is hereby created and established in said "Serial Electric Revenue Bond Fund, 1945", a Reserve Account. The District does hereby obligate and bind itself irrevocably to pay annually into such Account in the manner provided in paragraph 3 of this Section, not later than the principal payment date of each year, an amount equal to ten percent (10%) of the total principal and interest requirements of the next ensuing year. Whenever the moneys in said Ac-

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count aggregate an amount equal to the total principal and interest requirements for the next ensuing year, payments thereafter paid into said Account may be used by the District for the purpose of purchasing or redeeming said bonds, or for the purpose of making additions and betterments to and extensions of the electric utility system herein established, including the works, plants and facilities herein provided for, or for any other lawful purpose.

The "Serial Electric Revenue Bond Fund, 1945", created and established hereunder, shall be drawn upon for the sole purpose of paying the principal of and interest on said bonds as the same shall fall due, except that as hereinabove provided, moneys in the Reserve Account in said Fund in excess of an amount equal to interest and principal requirements for the next ensuing year may be used as hereinabove provided, and from and after the date of the issuance of said bonds and so long as any obligations are outstanding against said Fund, the Treasurer of the District shall set aside and pay into said Fund from the gross revenues of the public utility herein established and all of the electric works, plants and facilities of the District, including additions and betterments to and extensions of the foregoing now or hereafter provided for, the amounts hereinabove provided to be paid into said Fund, and said gross revenues are hereby pledged to the payments above specified, which payments shall constitute a charge upon such gross revenues prior and superior to all charges whatsoever. The Treasurer of the District is hereby directed to make payments of the bonds and coupons herein authorized to be issued as the same fall due, from the moneys in said "Serial Electric Revenue Bond Fund, 1945", and from no other source. The payments of said bonds and the coupons thereto attached, as the same fall due, is hereby declared to be the only charge which has been made upon said Fund or which will ever be made thereon until all of said bonds and interest coupons shall have been fully paid. The District hereby covenants and agrees, and the Treasurer of the District is hereby directed, to make Funds available from said Fund to the paying agents for said bonds and coupons at least fifteen

(15) days before interest and principal payments thereon are due.

The Commission of the District hereby declares that in fixing the amounts to be paid into said Fund, as above provided, it has exercised due regard to the costs of operation and maintenance of the public utility herein established and the electric works, plants and facilities to be acquired or constructed hereunder and of the additions and betterments to, and extensions of the foregoing, and that it has not obligated and bound the district to set aside into such special fund a greater amount of the revenues to be derived from the works, plants and facilities to be acquired as herein provided, and the additions and betterments to and extensions thereof, than in its judgment will be available over and above such costs of maintenance and operation.

The District hereby binds itself to maintain and continuously operate in an efficient and economical manner the electric utility of the District, and the works, plants and facilities aforesaid, the additions and betterments thereto and extensions thereof, to keep the same in good repair, and not to sell, lease or in any manner dispose of the electric utility herein established or the works, plants and facilities for the generation, transmission and distribution of electricity to be acquired or constructed hereunder, including any additions and betterments to and extensions thereof which hereafter may be acquired by purchase, condemnation or construction, or any substantial part of any of the foregoing, until all obligations outstanding against, or payable from the special fund hereby created, shall have been paid in full, or in case the District shall sell or dispose of the same before payment of such obligations, it shall not make any sale or disposition without then or theretofore providing that from the proceeds of any such sale or disposal there shall be placed in said special fund a sum sufficient in amount to discharge, and to be used for no other purpose than the discharge, of the principal and interest of all bonds issued hereunder and then remaining unpaid; and it shall not, in any event, sell or dispose of said works, plants or facilities, or any substantial part thereof, for a

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sum less than sufficient to discharge and pay the bonds issued hereunder, and the interest thereon.

The District hereby binds itself to keep such of the works, plants and facilities of the District as are usually insured by corporations operating like properties, insured to the full insurable value thereof in a responsible insurance company or companies against risks, accidents or casualties, against which insurance is usually carried by corporations operating like properties, and that in the event of any loss or damage, the District will repair or reconstruct promptly the damaged portion of the insured property and will apply the proceeds of the insurance policies covering such loss solely for that purpose, or in the event the District should determine not to repair or replace such damaged property, the proceeds of said insurance policy or policies shall be used solely for the purpose of calling and redeeming said bonds or purchasing said bonds at less than the price at which same might be redeemed.

The District further binds itself to keep proper books of account in accordance with rules prescribed by the Division of Municipal Corporations of the State Auditor's office of the State of Washington, or in the event the laws of the State of Washington should fail to provide an agency prescribing rules for keeping said books and records of account, then such books and records of account shall be kept in accordance with the rules prescribed by the Federal Power Commission. The District further agrees that all employees or agencies of the District collection or handling money of the District shall be bonded by a responsible surety company or companies in amounts sufficient adequately to protect the District from loss.

The District further binds itself to establish and maintain rates or charges for the electricity generated, transmitted and distributed by means of the public utility system herein established including all works, plants and facilities to be acquired or constructed as provided herein, and all additions and betterments to and extensions thereof which hereafter may be purchased, condemned or constructed, as will provide sufficient revenues to permit the payment of said sums into such special fund which the District has pledged

to set aside for the payment of principal and interest and for the Reserve Account as herein provided, to be applied to the payment of the principal and interest of the bonds herein authorized until such bonds and interest shall have been paid in full, and in addition thereto, all costs of operation and maintenance.

G. The bonds herein authorized shall be sold in such amounts and at such time or times as the commission of the District by resolution shall direct. The proceeds derived from the sale of said bonds shall be placed in a fund which is hereby created and designated as the "Electric Acquisition Fund, 1945", and said proceeds shall be used solely to paid the costs and expenses of the acquisition by purchase or condemnation of the works, plants and facilities herein provided for, and the construction of the additions and betterments thereto and extensions thereof aforesaid, to pay all costs and expenses in connection therewith and to effectuate the provisions of the plan and system as herein specified and adopted; provided, that any moneys remaining after all expenditures for the purposes above stated have been made shall be transferred and deposited in the "Serial Electric Revenue Bond Fund, 1945", created and established by Paragraph F hereof.

Passed by the Commission of Public Utility District No. 1 of Chelan County this 18th day of October, 1945.

(S.) L. J. Richardson,
President.

Attest:

(S.) W. K. McKenzie,
Secretary Pro Tem.

(Official Seal of Public Utility District No. 1 of Chelan County)

Certificate

I, W. K. McKenzie, do hereby certify that I am the duly elected, qualified and acting Secretary Pro Tem. of Public Utility District No. 1 of Chelan County, Washington, and

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the custodian of its records; that the attached and foregoing is a full, true and correct copy of Resolution No. 51, entitled

"A Resolution establishing a public utility and providing for the acquisition, by purchase or condemnation, of certain works, plants and facilities for the generation, transmission and distribution of electricity, and the construction of certain additions and betterments thereto and extensions thereof, specifying and adopting a system or plan therefor, creating certain special funds, and authorizing the issuance and sale of revenue bonds in an amount not exceeding $10,000,000,"

and that said resolution was adopted by the affirmative vote of a majority of all of the commissioners of said district at their regular meeting held on October 18, 1945, at which a majority of all members of the commission were present; that said resolution has not been altered or amended, and the same is in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District this 18th day of October, 1945.

(S.) W. K. McKenzie,
Secretary Pro Tem. of Public Utility District No. 1 of Chelan County.

(Official Seal of Public Utility District No. 1 of Chelan County)